No. 95-709

Supreme Court, U.S.
FILED
DEC 14 1995
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

FORD MOTOR COMPANY and
ROBERT H. IRWIN MOTORS, INC.,
Petitioners,

v.

JO-ANN TEBBETTS, Administratrix of the Estate of
Rebecca Anne Tebbetts,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

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REPLY BRIEF FOR THE PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR THE PETITIONERS

Our petition showed that "no-airbag" tort claims conflict with, and are therefore preempted by, the National Traffic and Motor Vehicle Safety Act of 1966 and Federal Motor Vehicle Safety Standard 208; that all four United States Courts of Appeals which have addressed the issue have so held; that more than 130 other courts have so held; and that the decision below by the Supreme Court of New Hampshire directly conflicts with all of those decisions. Respondent Tebbetts nevertheless contends that there is no conflict. She also contends that the judicial disarray on this issue, which already has had to be decided by nearly 200 courts, has sharply divided state and federal courts in several jurisdictions, and continues to be litigated throughout the country, is not important enough to require review by this Court. Those conclusions are as indefensible as are the arguments on which Tebbetts bases them.

1. Tebbetts makes the remarkable assertion that the decisions by four federal courts of appeals holding "no-airbag" claims preempted "are of no moment" because they were based on implied-preemption reasoning in tobacco product liability cases that was "explicitly reject[ed]" by this Court in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). (Opp. Br. 7.) But in holding "no-airbag" claims impliedly preempted, the federal courts of appeals in fact cited tobacco cases solely for the established principle that a "state tort suit [could be] preempted [if] it had a regulatory effect." *Wood v. General Motors Corp.*, 865 F.2d 395, 417 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990); *Taylor v. General Motors Corp.*, 875 F.2d 816, 824 n.16 (11th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990). *See also Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1122 (3rd Cir.), *cert. denied*, 498 U.S. 853 (1990). This Court explicitly *affirmed* that preemption principle in holding various state tort claims preempted in *Cipollone*.[1] *Cipollone*, 504 U.S. at 521-22.

Nevertheless, Tebbetts claims that the decisions in pre-*Cipollone* tobacco cases must have "infected the interpretation of the Safety Act" (Opp. Br. 7) because in the years before the tobacco decisions, "eight federal appeals courts and five state courts of last resort" had held that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law." (*Id.* at 6.) But the inconsistency

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[1] In *Pokorny* the Third Circuit also cited its previous tobacco decision for the proposition that an express preemption provision does not expressly preempt common law claims unless the provision explicitly refers to such claims. *Pokorny*, 902 F.2d at 1123. Other courts that have held "no-airbag" claims not expressly preempted have made that same mistake. *See, e.g., Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312, 320 (Pa. Super. Ct. 1989). In *Cipollone* this Court explicitly rejected that notion. *Cipollone*, 505 U.S. at 521-23. Therefore, not only did *Cipollone* not undermine the decisions holding "no-airbag" claims impliedly preempted, but it in fact gave further support to the decisions holding such claims expressly preempted.

that Tebbett claims to see between the early cases she cites and the more than 130 subsequent cases holding "no-airbag" claims preempted is chimerical. The cases she cites held that compliance did not constitute a defense, but they did not, as she clearly wishes this Court to infer from her statement, hold that common law claims are not preempted when they conflict with an applicable Federal Motor Vehicle Safety Standard. To the contrary, *none* of those cases involved Safety Standard 208, *none* involved a "no-airbag" claim, and *none* addressed the issue of implied conflict preemption or express preemption. Only one of the cases mentioned preemption at all, and that case addressed only the issue of implied preemption of the field. *See Arbet v. Gussarson,* 225 N.W.2d 431, 438 (Wis. 1976). Thus, as the First Circuit stated of those cases when holding "no-airbag" claims preempted in *Wood,* 865 F.2d at 417:

> The cases cited by Wood [and cited by Tebbetts here] fail to support this assertion. Not a single appellate decision addresses the question of the implied preemption of a state law cause of action that would effectively create a state standard, not identical to a federal standard, in violation of [the Safety Act's preemption provision, 15 U.S.C.] section 1392(d).
>
> Instead, the cited cases hold that compliance with a federal safety standard does not serve as a defense on the merits of a defective design claim. . . .
>
> The issue in this case—implied preemption of a state product liability suit that would stand as an obstacle to the uniformity of federal standards—is distinct from a defense on the merits. . . . The latter is much broader—the manufacturer just claims compliance with a standard, and argues that compliance proves that the car could not have been defectively designed.

The fact that *Cipollone* did nothing to undermine the many cases holding "no-airbag" claims preempted is further shown by the very post-*Cipollone* cases on which Tebbetts relies: *Myrick v. Freuhauf Corp.,* 13 F.3d 1516

(11th Cir. 1994), *aff'd on other grounds sub nom. Freightliner Corp. v. Myrick*, —— U.S. ——, 115 S. Ct. 1483 (1995); and *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, —— U.S. ——, 115 S. Ct. 1819 (1995). In those cases the Eleventh Circuit and the Arizona Supreme Court both misread this Court's decision in *Cipollone* as having dramatically changed preemption law so as to preclude any form of implied preemption when the federal statute in issue contained an express preemption provision. *See Myrick*, 13 F.3d at 1521; *Hernandez-Gomez*, 884 P.2d at 189. On review in *Myrick*, however, this Court flatly rejected that misreading of *Cipollone* as "without merit," 115 S. Ct. at 1487, and the Court then vacated the Arizona Supreme Court's judgment in *Hernandez-Gomez* (which is not a "no-airbag" case in any event) and remanded for reconsideration in light of *Myrick*. Thus, the decision in *Myrick* made it plain that *Cipollone* did not alter the basic implied preemption analysis that led more than 130 state and federal courts to conclude that "no-airbag" claims were preempted.

2. Tebbetts is also wrong in contending that the dozens of post-*Cipollone* cases holding "no-airbag" claims preempted should be ignored simply because they are decisions by federal district courts and state courts that are not courts of last resort. As shown in our petition, and as Tebbetts does not deny, this important constitutional issue has already been decided by nearly 200 courts and yet continues to occupy the time and resources of courts throughout the country. As further shown in our petition, and as also not denied by Tebbetts, *every* federal court that has considered this issue since this Court decided *Myrick* has held "no-airbag" claims preempted,[2] while

[2] Since we filed our petition, two more federal district courts have held "no-airbag" claims preempted. *See Hill v. General Motors Corp.*, No. 94-AR-0088-S (N.D. Ala. Nov. 15, 1995); *Beeman v. Lovelace*, No. CIV-94-1956-A (W.D. Okla. Nov. 2, 1995).

several state courts have continued to misread *Cipollone* and have found no preemption. It is simply intolerable that the viability of a "no-airbag" claim in a growing number of jurisdictions should turn on whether the plaintiff chooses a federal courthouse or the state courthouse across the street. It is equally intolerable that the state courts that have found an absence of preemption are doing so in direct disregard of the repeatedly articulated federal policy of encouraging a diversity of restraint systems in automobiles made before the 1997 model year.

Tebbetts tries to dismiss these severe problems by arguing that, "if it was [*sic*] current federal policy to encourage diversity in passive restraint systems, then disagreements among the lower courts would presumably reinforce that policy, not erode it. The manufacturers could hardly be prompted to take uniform actions by varying court decisions." (Opp. Br. 11.) That argument is pure sophistry. Faced with many courts' holding that *either* airbags *or* other restraint systems are sufficient to prevent massive tort liability, but with some other courts' holding that airbags must be installed to avoid the threat of massive "no-airbag" tort liability, automobile manufacturers making the same vehicles for all states in 1988 would have been forced into uniform action—namely, installation of airbags in all vehicles—because only that course of action could have prevented liability in all jurisdictions. This is especially obvious where, as in New Hampshire, the conflicting court decisions are in the very same locale and manufacturers cannot predict which of their automobiles will be in accidents that result in lawsuits in state courts and which will be in accidents that result in lawsuits in federal courts.

Tebbetts is equally wrong in arguing that, "whether or not it was federal policy at some time in the past to encourage diversity in passive restraint systems, it is plainly federal policy today to encourage all auto manufacturers to install airbags in their cars. *See* 49 U.S.C.

section 30127(b) (requiring airbags for front seat drivers and passengers in at least 95 percent of new cars after August 31, 1996, and 100 percent of new cars after August 31, 1997)." (Opp. Br. 11.) What the cited statute shows is a federal policy to require automobile manufacturers to install airbags *after August 31, 1996*. If federal policy had been to encourage manufacturers to install airbags today, the statute would have made the requirement applicable today. The timing selected by Congress reflects appropriate congressional concern that disastrous consequences could result from a premature airbag requirement. In fact, data just published by the Safety Administration show that more than 50,000 airbag-related injuries and deaths are already occurring every year. *See NHTSA Publication Provides In-Depth Crash Data,* 22 Highway & Vehicle/Safety Rep. No. 6, at 4 (Nov. 27, 1995). That tragedy could well have been greater had Congress or the Safety Administration prematurely rushed an all-airbag requirement into effect.

3. Tebbetts next argues that this Court's decision in *Myrick* supports the decision below because in *Myrick* "[t]his Court did not address the Eleventh Circuit's holding that, under *Cipollone,* section 1397(k) constitutes such a 'reliable indicium of congressional intent' that it precludes a finding of implied preemption under the Safety Act." (Opp. Br. 9.) As shown in our petition, however, and as Tebbetts does not deny, this Court in *Myrick had* to have implicitly rejected the Eleventh Circuit's "reliable indicium" conclusion because, after having found an absence of express preemption, this Court did not conclude that it was inappropriate to consider implied preemption under the Safety Act; instead, this Court performed an implied-preemption analysis and held that, because of the absence of a conflict between state law and federal law under the facts of that case, there was no implied preemption. *See Myrick,* 115 S. Ct. at 1488.

4. Tebbetts argues that the decision below "is entirely consistent with this Court's decisions governing preemption analysis" (Opp. Br. 12), but the contentions she makes to support that argument are specious.

a. She contends that by enacting section 1397(k), "Congress enacted an express anti-preemption clause that explicitly preserves common law claims." (Opp. Br. 9.) But section 1397(k) is not an "express anti-preemption clause." As shown in our petition, and as Tebbetts does not deny, (a) section 1397(k) never even mentions anti-preemption, preemption, or federal supremacy at all; (b) section 1397(k) does not appear in the Safety Act's actual preemption provision; (c) section 1397(k) does not use saving-clause language of the type commonly used by Congress to limit the scope of preemption provisions; (d) there are two true saving clauses in the preemption provision of the Safety Act itself; (e) the legislative history of section 1397(k) makes no mention of anti-preemption, preemption, or federal supremacy; and (f) the failure of the Supreme Court of New Hampshire to consider, much less give effect to, these undisputed textual and structural facts is inconsistent with this Court's decisions requiring consideration of a preemption provision's text and structure. *See, e.g., CSX Transp., Inc. v. Easterwood*, —— U.S. ——, ——, 113 S. Ct. 1732, 1737 (1993); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

b. Tebbetts concedes that the court below failed even to mention, much less apply, the doctrine of implied preemption that governs when a state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal law (Opp. Br. 16), yet she asks this Court to disregard that constitutional error as "hardly significant" on the grounds that "various types of 'actual conflict' were fully briefed by the parties" and "the pre-*Cipollone* decisions finding implied preemption on 'actual conflict' grounds were considered and rejected" by the court below. (Opp. Br. 16.) Tebbetts cites no authority,

and we know of none, for the proposition that an error which results from a court's failure to apply, or even recognize, a constitutional requirement can be disregarded simply because the parties briefed the requirement that the court ignored or because the court "considered and rejected" other courts' decisions without recognizing the constitutional principles on which those decisions were correctly based.

c. Tebbetts contends that the court below correctly rejected "Ford's true position . . . that a court may consider implied preemption even where, as here, Congress's express words *do* provide a reliable indicium of congressional intent with respect to preemption." (Opp. Br. 17 (emphasis in original).) But that completely mischaracterizes Ford's position, which is that section 1397(k) does not address preemption at all, much less provide a reliable indicium of congressional intent. (*See* Pet. 14-20.) It also ignores the fact that the First Circuit and other courts have explicitly held that section 1397(k) does *not* provide a reliable indicium of congressional intent to preclude conflict preemption of common law claims. *See, e.g., Wood*, 865 F.2d at 401-02, 407, 414-16. Even the court below recognized that the preemption provision, section 1392(d), indicates Congress' intent to preempt common law claims. (*See* Pet. App. 4a.) It was only by looking outside the preemption provision, to section 1397(k), and then ignoring the "compliance with" language of section 1397(k) that the court could offer any basis for restricting the scope of section 1392(d). Thus, the court ignored this Court's mandate to ask whether *the preemption provision* provided a reliable indicium of congressional intent, and instead asked whether a *different* provision provided a reliable indicium of congressional intent.

d. Tebbetts contends that there is no conflict between Safety Standard 208 and her "no-airbag" claim and that the court below therefore properly ignored this Court's

decisions giving preemptive effect to federal regulations. (Opp. Br. 17.) But the Safety Administration has repeatedly declared that there *is* a direct conflict and that "no-airbag" claims *do* undermine federal motor vehicle safety policies. (*See* Pet. 21-22.) Tebbetts does not even mention, much less explain, why it was proper for the court below to disregard those declarations of regulatory intent.

e. Finally, Tebbetts denies that general saving clauses do not preclude implied conflict preemption. (Opp. Br. 18.) Like the court below, however, she does not even mention, much less discredit or distinguish, the unbroken line of decisions by this Court cited in our petition and holding that general saving clauses could not preclude implied preemption where the asserted common law claim conflicted with the policies and purposes of federal law. (*See* Pet. 26 (citing *John Hancock Mut. Life Ins. Co. v. Harris Trust Sav. Bank*, —— U.S. ——, ——, 114 S. Ct. 517, 526 (1993); *International Paper Co. v. Ouellette*, 479 U.S. 481, 492-94 (1987); *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 331 (1981); *T.I.M.E. Inc. v. United States*, 359 U.S. 464, 473-74 (1959); *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 129-30 (1915); *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).)

In sum, Tebbetts' contention that the decision below "is entirely consistent with this Court's decisions governing preemption analysis" rests on her ignoring altogether this Court's saving-clause decisions, the Safety Administration's repeated affirmations that "no-airbag" claims are preempted, the "compliance with" language of section 1397(k), this Court's decisions construing "standard" and "safety standard" to include common law standards, this Court's decisions holding that implied preemption exists when a common law claim stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, and this Court's decisions requiring that pre-

emption provisions be interpreted in light of their texts and structures. A decision that conflicts with such a plethora of preemption principles established by this Court, and with more than 130 decisions by other courts addressing the same issue, should be reviewed and reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 14, 1995